No. 89-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,

and

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

ROBERT CONNERTON
(Counsel of Record)
ORRIN BAIRD
CONNERTON, RAY & SIMON
1920 L Street, N.W.
Fourth Floor
Washington, D.C. 20006
(202) 466-6790

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the federal courts have authority pursuant to 39 U.S.C. § 1208(b) to order tripartite arbitration of a jurisdictional dispute between two unions where there exists a contractual nexus between the two unions and a common employer and there are no procedural obstacles to tripartite arbitration.

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BRIEF IN OPPOSITION

The respondent National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO [1] hereby opposes the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990) filed by the American Postal Workers Union, AFL-CIO.

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[1] Since commencement of this action, the respondent union has changed its name to National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO.

STATEMENT OF THE CASE

Respondent National Postal Mail Handlers Union ("Mail Handlers") supplements the facts set forth in the American Postal Workers Union's ("APWU") petition as follows: [2]

The Mail Handlers and the APWU have separate, but very similar, collective bargaining agreements with the Postal Service covering wages, hours, terms and conditions of employment. Pet. App. 2a. Both agreements incorporate, via an identical Article 19, a document entitled Regional Instruction 399, "Mail Processing Work Assignment Guidelines" ("RI-399"). E.R. 112-113, 128 & 147. Thus, all three parties of this lawsuit are contractually bound by the provosions of RI-399. Pet. App. 3a.

RI-399 was issued by the Postal Service in 1979. It sets forth each mail processing operation performed by Postal Service employees and designates the primary craft for the performance of each function—either the clerk craft (represented by APWU) or the mail handler craft (represented by the Mail Handlers). E.R. 112 & 134-139. For many years the Mail Handlers, the APWU and the Postal Service have used RI-399 as the basis for resolving work jurisdiction disputes between the Mail Handlers and the APWU. E.R. 113.

The grievance-arbitration provisions of the Mail Handlers-Postal Service and the APWU-Postal Service collective bargaining agreements are in large part identical. E.R. 119-120, 122-127 & 141-146. Both agreements contain identically-worded, broad arbitration provisions covering jurisdictional disputes. Pet. App. 7a. Each agreement provides for a three-or-four-step procedure involv-

[2] As in the petition, citations to the Petitioner's Appendix shall be denominated as "Pet. App. ——." Citations to documents contained in the Excerpt of Record filed in the Court of Appeals shall be denominated "E.R. ——."

ing discussions between union and management officials at successively higher levels followed by arbitration before a neutral arbitrator. E.R. 119-120, 122-127 & 141-146.

Although the arbitrator in this case denied intervention to the Mail Handlers because he believed he did not have authority under the APWU-Postal Service agreement to permit intervention over the APWU's objection, he did find that the Mail Handlers clearly had a "strong, legitimate interest in the outcome" of the dispute, that there was no merit to APWU's claim that the Mail Handlers' interests were sufficiently protected by the Postal Service's presence and that tripartite arbitration was clearly the most sensible way to proceed. Pet. App. 3a & 14a; E.R. 5-6 & 10.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE COURTS ON THE ISSUE PRESENTED HEREIN.

This Court previously considered the issue of tripartite resolution of union jurisdictional disputes in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1956) (hereinafter cited as *Transportation-Communication Employees*). Although that case arose under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, the Court relied on cases[3] decided under Section 301(a) of the Labor-Managament Relations Act, 29 U.S.C. § 185(a) (hereinafter cited as Section 301).

In that case, the Court noted that a collective bargaining agreement "is not an ordinary contract" but "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate" and "calls into being

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[3] *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

a new common law—the common law of a particular industry or of a particular plant." *Transportation-Communication Employees*, 385 U.S. at 160-61 *quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578-79. The Court rejected the argument that jurisdictional disputes between two unions should be decided on the basis of one union's collective bargaining agreement considered in isolation from all other agreements. *Transportation-Communication Employees*, 385 U.S. at 160. The Court concluded:

> In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as, the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purposes of settling a jurisdictional dispute over work assignments.

Id., at 161. The Court ordered the Railroad Adjustment Board, the statutory equivalent of an arbitrator in the railroad industry,[4] to decide jurisdictional disputes between two unions in a single tripartite proceeding. *Transportation-Communication Employees*, 385 U.S. at 165.

All of the appellate and district court cases decided subsequent to the *Transportation-Communications Employees* case are in agreement with that decision and the decision of the Court of Appeals in this case. The leading case ordering tripartite arbitration under Section 301[5] is *Columbia Broadcast System, Inc. v. American*

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[4] *See* 45 U.S.C. § 183(i).

[5] This case is actually brought under Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), which is the postal analogue to Section 301. The federal courts freely apply Section 301 law to actions brought under 39 U.S.C. § 1208(b). *See Bowen v. United States Postal Service*, 459 U.S. 212, 232 n.2 (1983) (separate opinion of White, J.); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987);

Recording & Broadcast Ass'n, 414 F.2d 1326 (2d Cir. 1969) (hereinafter cited as *CBS*). Noting that "there is ample authority holding that § 301 gives the federal courts broad jurisdiction to deal with many types of controversies that arise between labor and management," the Second Circuit held that a district court does have jurisdiction to order tripartite arbitration over a jurisdictional dispute between two unions because to do so would be "in line with the overall national policy of furthering industrial peace by resort to agree-upon arbitration procedures." *CBS*, 414 F.2d at 1328 *citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 577-78.

The Second Circuit found that tripartite arbitration was appropriate in that case because both unions had agreements with a common employer containing broad arbitration provisions covering jurisdictional disputes and the second union had agreed to arbitrate its dispute before an arbitrator who had been chosen in accord with first union's agreement. *CBS*, 414 F.2d at 1329.

Prior to the decision by the Court of Appeals in this case, the Third, Fourth and Seventh Circuits have, at least in *dicta*, endorsed the rationale of *CBS*.[6] The Fourth Circuit affirmed (albeit without opinion) a decision compelling tripartite arbitration over a jurisdictional dispute between two unions. *Baltimore Typographical Union No. 12 v. A. S. Abell Co.*, 588 F.2d

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National Ass'n of Letter Carriers v. United States Postal Service, 590 F.2d 1171, 1174 (D.C. Cir. 1971).

[6] In *Bell Aerospace v. Local 516, United Auto Workers*, 500 F.2d 921, 923 (2d Cir. 1974), the Second Circuit followed its decision in *CBS*. The District of Columbia Circuit recently held in a case involving this same issue, the same parties and essentially the same facts, that under the doctrine of issue preclusion, the decision of Court of Appeals in this case precluded the APWU from relitigating this issue in a different circuit court. *National Post Office Mail Handlers v. American Postal Workers Union*, Nos. 89-5272 & 89-5273 (D.C. Cir. July 3, 1990).

1347 (4th Cir. 1979), *aff'g mem.*, 441 F.Supp. 596 (D. Md. 1977). This district court had relied on *CBS* in ordering tripartite arbitration.

The Seventh Circuit, in *Laborers' International Union v. W. W. Bennett Construction*, 686 F.2d 1267, 1273-74 (7th Cir. 1982), expressly endorsed *CBS* as long as both unions have arbitration agreements with the employer. In *Bennett*, the court actually declined to order tripartite arbitration but only because there was no evidence of an arbitration agreement between one of the two competing unions and the employer. *Id.* at 1276-78. However, the Seventh Circuit specifically noted that the employer could file a new Section 301 action to apply *CBS* if it could allege sufficient facts. *Id.* at 1278.

In *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353 (3d Cir. 1970), the Third Circut approved the rationale of *CBS* in *dicta* and dismissed the union's action against the employer seeking bipartite arbitration of a jurisdictional dispute because of the union's failure to join the other interested union under Fed.R.Civ.P. 19 as an additional defendant in the case.

Relying on the Court of Appeals decision here, the Sixth Circuit very recently refused to order tripartite arbitration because there was no contractual nexus between the two unions and the employer. *United Industrial Workers v. Kroger Co.*, 900 F.2d 944, 947 (6th Cir. 1990). In that case, one union sued an employer to compel a bipartite arbitration over the transfer of work by the employer from the members of the first union to the members of a second union. The employer attempted to interplead the second union which did not want to participate in the arbitration. The Sixth Circuit denied the interpleader.

It distinguished the Court of Appeals decision here on the ground that there was no contractual nexus since the employer had not initiated a grievance against the sec-

ond union as their contract specifically required.[7] *Id.* The Sixth Circuit also noted, relying again on the Court of Appeals decision here, that there were procedural obstacles to tripartite arbitration since the two collective bargaining agreements called for different types of arbitration. *Id.* at 947-48.

In addition to these cases, all of the district courts that have been confronted with circumstances similar to *CBS* have compelled tripartite arbitration of the jurisdictional dispute in question: *RCA Corp. v. Local Union 1666, Int'l Bh'd of Electrical Workers,* 633 F.Supp. 1009 (E.D. Pa. 1986); *Local 552, American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians,* 112 L.R.R.M. 2446 (N.D. Cal. 1982); *c.f. United Brick and Clay Workers v. Hydraulic Press Brick Co.,* 371 F.Supp. 818, 825 (E.D. Mo. 1974) (tripartite arbitration ordered between union, former employer and successor employer); *United Steelworkers v. Crane Co.,* 456 F.Supp. 385, 387-89 (W.D. Pa. 1978) (same), *rev'd in part on other grounds,* 605 F.2d 714 (3d Cir. 1979).[8]

II. THIS CASE DOES NOT PRESENT AN IMPORTANT, RECURRING ISSUE OF LABOR LAW.

1. The Petitioner APWU contends that the issue presented by this case is of importance because it "has arisen with some frequency." Pet. p. 20. The Respondent Mail

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[7] Although no formal grievance was filed by the Mail Handlers here, both the Mail Handlers and the Postal Service desired tripartite arbitration. The APWU, which initiated the grievance, did not want tripartite arbitration. In *Kroger,* on the other hand, the second union neither initiated the grievance nor desired tripartite arbitration, and the first union desired only bipartite arbitration.

[8] The only district court decision to deny tripartite arbitration is *Amalgamated Meat Cutters, Local 299 v. Alpha Beta Markets, Inc.,* 96 L.R.R.M. 2509 (S.D. Cal. 1977), which did so because the second union, which the first union sought to join in the arbitration, had no agreement with the employer. Thus, it is consistent with *CBS* and with the Court of Appeals in this case.

Handlers respectfully disagree. Given the frequency with which jurisdictional disputes between competing unions arise and the intensity of the feelings that often accompany those disputes, it is surprising that there has only been a handful of cases in the last 20 years which have addressed this issue. The *CBS* case was decided over 20 years ago. The decision below is only the second time that an appellate court has addressed the issue under the same circumstances– -i.e., where both unions have agreements to arbitrate jurisdictional disputes—since the *CBS* case was decided.[9] In the only other appellate decision, the Fourth Circuit affirmed without an opinion the district court's order compelling tripartite arbitration where both unions requested tripartite arbitration. *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 588 F.2d 1349, *aff'g mem.*, 441 F. Supp. 596.

There have been only three other reported district court decisions since the *CBS* decision which address this issue and which were not appealed.[10] In light of the unanimity of the courts on this issue, it is unlikely that many unions, if any at all, will bother to incur the cost of litigating this issue in the future.

The scarcity of cases is not surprising given the fact that there seems to be no dispute that tripartite arbitration is the most efficient, economical and sensible way to resolve jurisdictional disputes between labor unions. *See* Pet. App. 8a. Thus, in the vast majority of cases, either

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[9] As discussed *infra* at pp. 5-7, the Third, Sixth and Seventh Circuits have touched upon the issue, albeit under different circumstances: *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353; *United Industrial Workers v. Kroger Co.*, 900 F.2d 944. *Laborers' Int'l Union, Local 309 v. W. W. Bennett Construction Co., Inc.*, 686 F.2d 1267.

[10] *RCA Corp. v. Local Union 1666, Int'l Bh'd of Electrical Workers*, 633 F.Supp. 1009; *Local 552, American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians*, 112 L.R.R.M. 2446; *Amalgamated Meat Cutters Local 299 v. Alpha Beta Markets, Inc.*, 96 L.R.R.M. 2509.

the arbitrator permits intervention by the competing union, the unions voluntarily choose to participate in tripartite arbitration or they devise some other method of private dispute resolution. It is only when one union perceives that it substantially benefits from multiple bipartite arbitrations that the issue is ever litigated.

Given the infrequency with which the issue is litigated and the fact that unions and employers have devised private alternative methods of resolving jurisdictional disputes, the importance of deciding the issue presented by this case is not significant.

2. Even among the parties to this case, there is little likelihood that this issue will recur. It is likely that any future disputes over intervention by the Mail Handlers in APWU arbitrations will be decided by arbitration and will never reach the courts since a binding national arbitration award has now been issued requiring tripartite arbitration under the collective bargaining agreement to which the APWU is signatory.[11] *United States Postal Service and Nat'l Ass'n of Letter Carriers*, USPS Case No. H4N-4J-C 18504 (1989) (Britton, Arb.). The APWU intervened and participated in that arbitration proceeding and therefore should be bound by that arbitration award. Since the APWU is bound by the Britton award, it should be barred from objecting to the Mail Handlers' intervention in future arbitrations over jurisdictional disputes arising under the APWU's collective bargaining agreement.

Although no national postal arbitrator has yet specifically held that the APWU is bound by the Britton award,

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[11] Under the Postal Service collective bargaining agreements, there are binding national arbitration awards and non-binding regional arbitration awards. The arbitration award in this case was a non-binding regional award. By no means are the regional arbitrators in agreement that non-signatory unions are not permitted to intervene in arbitrations over jurisdictional disputes. The regional arbitrators are more or less equally divided on this issue.

there exists a high probability that such an award will issue—unless the APWU concedes the issue—and there will be no need for the courts to further address this issue with regards to the parties herein.[12]

3. This case arises out of the unique circumstances of Postal Service collective bargaining and thus does not present an appropriate vehicle for establishing broad applicable legal principles regarding tripartite arbitration of union jurisdictional disputes. Both the Mail Handlers and the APWU have practically identical collective bargaining agreements with the Postal Service. Pet. App. 2a. Both agreements contain essentially identical arbitration provisions. ER. 119. All three parties are contractually bound by identical substantive rules—R.I.-399—for the determination of work assignments in the Postal Service. Pet. App. 3a. Thus, this case is not typical of jurisdictional dispute cases where the unions are likely to have negotiated very different agreements with inconsistent or even conflicting jurisdictional standards.

In addition, the Mail Handlers have agreed to participate in arbitration proceedings initiated by the APWU. Therefore, there is no dispute among the unions as to procedures that are to apply to the arbitration or as to how the arbitrator is to be chosen. This is not necessarily true in the typical jurisdictional dispute case where the parties may have completely different procedures and methods for arbitrating jurisdictional disputes.

Finally, this lawsuit, itself, is brought under Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (hereinafter cited as "Section 1208") and not under Section 301 which applies only to private section labor relations. The two statutes may be similarly worded, but they arise out of different acts of Congress

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[12] In addition, the dispute over tripartite arbitration could be resolved in the upcoming negotiations scheduled to begin in a few months.

and apply to differnt types of employers, i.e. federal sector and private sector. Although similar legal principles are involved, the result may not always be the same under the two different statutes.[13]

III. THE DECISION BELOW WAS CORRECTLY DECIDED.

1. The APWU's argument that the Court of Appeals' decision undermines the principle of the voluntariness of labor contracts and, contrary to forty years of this Court's precedents, reinstates the federal courts as the ultimate authority over labor relations (Pet. 6-22) grossly overstates the facts of this case. The truth is that any infringement upon the voluntariness of contract by the district court's order compelling tripartite arbitration is minimal, at most.

The APWU voluntarily created and invoked the contractual arbitration procedure that led to this lawsuit and has already appeared before the arbitrator selected by the APWU and the Postal Service to hear disputes, including jurisdictional disputes such as the one involved in this case. Pet. App. 3a. The arbitration rules provided for in the APWU-Postal Service collective bargaining agreement will apply at the arbitration hearing. Pet. App. 7a. The identical substantive rules for determination dispute—R.I. 399—are incorporated into both the APWU and the Mail Handlers' collective bargaining agreements with the Postal Service. Pet. App. 3a. All that LIUNA and the Postal Service seek is an order permitting LIUNA to intervene in an APWU-initiated arbitration.[14] Thus, the APWU cannot be heard to com-

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[13] See discussion, *infra* at pp. 15-16.

[14] If this case involved a federal court proceeding rather than an arbitration proceeding, there is no doubt that the Mail Handlers would be permitted to intervene, if not required to do so. *See* Fed.R.Civ.P. 19(a) (compulsory joinder of necessary party), 20(a) (permissive joinder), 24(a)(2) (intervention of right), 24(b)(2)

plain that it has been hailed before an alien forum which it neither contemplated nor bargained for.

As the Court of Appeals stated, the relief sought in this case is, in effect, the consolidation of two consensual bipartite arbitration proceedings over the same dispute into a single tripartite proceeding. Pet. App. 6a. It is true that LIUNA has not formally initiated a grievance over this jurisdictional dispute since it has not yet been aggrieved because the work was initially assigned to its members. However, the fact that it filed both a cross-claim and counterclaim requesting tripartite arbitration is evidence enough that it desires to arbitrate these jurisdictional disputes. Mere procedural technicalities should not stand in the way of effectuating federal labor policy.

2. The APWU's argument which narrowly focuses almost exclusively on the federal labor policy favoring the voluntariness of collective bargaining agreements, not only overlooks other federal labor policies such as that of encouraging the orderly and rapid resolution of labor disputes,[15] but it ignores the federal courts' broad powers under Section 301—and by implication under Section 1208[16]—to fashion a federal common law of collective bargaining agreements to effectuate—and reconcile—these various labor policies.

Section 301 grants authority to the federal courts to enforce collective bargaining agreements. This Court long

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(permissive intervention) and 22(1) (interpleader). *See also Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353, discussed *supra* at p. 6.

[15] The Supreme Court first recognized this policy in the seminal Steelworkers Trilogy: *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[16] See fn. 5 *supra*.

ago recognized that Section 301 is not simply procedural, but grants to the federal courts broad authority to fashion appropriate relief that effectuates federal labor policy.

This Court first defined this judicial authority in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The Court held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. Most important, *Lincoln Mills* set guidelines for judicial development of the new common law of collective bargaining agreements. The Court noted that although the Labor Management Relations Act expressly provides some substantive law,

> Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id. at 457.

Given this broad mandate, this Court has carved out exceptions to the usually consensual nature of collective bargaining agreements where those exceptions are necessary to further the federal labor policy encouraging the resolution of labor disputes quickly and finally through private arbitration processes.

For example, in *Int'l Bh'd of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), this Court held that where a collective bargaining agreement contains a clause providing for the arbitration of grievances, the courts may imply and enforce against a union an obligation to refrain from striking during the term of the agreement

—even though the union has not agreed to a no-strike clause.[17]

Likewise, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, a "successor" employer was required to arbitrate a dispute although it had never signed a collective bargaining agreement with the union. The Court specifically held that a collective bargaining agreement is not "the simple product of a consensual relationship" and that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that [the successor employer] did not sign the contract being construed." *Id.* at 150. In these decisions, as in *CBS* and its progeny, the courts have interceded in order to aid the private arbitration process.

The APWU's sole reliance on the principle that labor agreements must be voluntary begs the point. The issue is not whether there is a federal labor policy that collective bargaining agreements must be voluntary, but how those agreements should be interpreted and applied in the context of *all* federal labor policies. This Court has repeatedly recognized that a collective bargaining agreement is more than a simple contract. *Transportation-Communication Employees*, 385 U.S. at 160-61; *John Wiley & Sons v. Livingston*, 376 U.S. at 150; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578-79. Thus, the Court has read and applied collective bargaining agreements not simply by their literal terms but in a manner that effectuates federal labor policy. *Transportation-Communication Employees*, 385 U.S. at 161-62; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. at 150; *cf. Int'l Bh'd of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. at 104-06.

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[17] The Supreme Court has also held that injunctive relief is available against such a strike despite the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, which prohibits injunctions in labor disputes. *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970). The Court reasoned "the Norris-LaGuardia policy of non-intervention should yield to the overall interest in the successful implementation of the arbitration process." *Id.* at 252-53.

Those federal courts which have ordered tripartite arbitration of jurisdictional disputes have relied upon their broad powers under Section 301, finding that tripartite arbitration "is in line with the overall national policy of furthering industrial peace by resort to agreed-upon arbitration procedures." *CBS*, 414 F.2d at 1328. The Court of Appeals below found that tripartite arbitration in this case was "practicable, economical, convenient and fair" and avoids duplication of effort and the possibility of conflicting awards. Pet. App. 8a. The APWU has not even attempted to argue why a process of multiple bipartite arbitration proceedings would effectuate overall federal labor policy or would be reasonable, efficient and fair for all parties concerned.

3. The APWU's argument also ignores the statute sued upon—Section 1208. There is no dispute that Section 1208 is the postal analog of Section 301,[18] but it does not necessarily follow that there are not different policy considerations under the two statutes.

Under Section 301, the courts are to apply "a federal common law" which the courts must "fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 456. In fashioning that federal common law under Section 1208, the courts should look not only to the policies expressed in the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, but to the specific postal labor policies expressed in the Postal Reorganization Act of 1971, 39 U.S.C. §§ 101 *et seq.*[19]

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[18] See fn. 5, *supra*.

[19] The Postal Reorganization Act gives postal employees the right to engage in collective bargaining regarding wages, hours and conditions of employment and incorporates certain, but not all, provisions of the Labor Management Relations Act. *See* 39 U.S.C. § 1209. In addition, the Postal Reorganization Act contains certain labor provisions which are different than those contained in the Labor Management Relations Act. *See, e.g.*, 39 U.S.C. §§ 1205, 1206 & 1207.

Unlike the Labor Management Relations Act, the Postal Reorganization Act requires mandatory fact finding and arbitration where the parties are unable to reach agreement on a collective bargaining agreement. 39 U.S.C. § 1207.[20] Thus, the Postal Reorganization Act, even more so than the Labor Management Relations Act, expresses a strong policy favoring arbitration of collective bargaining disputes and, in fact, mandates that the parties participate in mediation and arbitration when an agreement is not reached *even though the parties have not voluntarily agreed to do so.*[21]

4. Finally, the fallacy of the APWU's argument is demonstrated by its failure to discuss what is to happen under its theory of the law if conflicting bipartite arbitration awards are issued. In the D.C. Circuit case,[22] the APWU suggested that conflicting arbitration awards could be submitted to the district court which would

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[20] Correspondingly, postal workers are prohibited from striking. 18 U.S.C. § 1918 incorporated into the Postal Reorganization Act by 39 U.S.C. § 410(b)(2).

[21] The APWU argues that federal labor policy is hostile to the resolution of jurisdictional disputes through compulsory tripartite arbitration, as is apparent from the legislative history of Section 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k). Pet. 13 n.9. However, the administrative procedures of Section 10(k) for resolving jurisdictional disputes can be activated only when a union violates Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), which prohibits unions from using strikes, boycotts, threats or coercion to force or require an employer to assign particular work to the members of a particular union. The purpose of Section 8(b)(4)(D) and Section 10(k) is to stop jurisdictional strikes and the economic and social disruption that results from such strikes. *See, NLRB v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 580 (1961). However, postal employees are prohibited from striking. 18 U.S.C. § 1918. Therefore, Sections 8(b)(4)(D) and 10(k) do not, in effect, apply to Postal Service labor relations, and their legislative history should have no bearing upon whether courts should order tripartite arbitration under Section 1208.

[22] *National Post Office Mailhandlers v. American Postal Workers Union AFL-CIO*, Nos. 89-5272 & 89-5273, D.C. Cir. (July 3, 1990).

choose which one to enforce. This approach not only favors a wasteful and inefficient method of resolving labor disputes which directly contradicts the federal labor policy favoring their prompt resolution by private arbitration, but it is flatly contrary to this Court's repeated admonitions that the federal courts are not to delve into issues of contract interpretation. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596.

A second alternative would be for the court to order an additional tripartite arbitration proceeding. But this approach is not only inefficient and wasteful, it is contrary to the APWU's argument that the courts are without authority to order tripartite arbitration absent an express agreement to submit disputes to tripartite arbitration.

This leaves one final alternative. The courts could simply enforce both arbitration awards against the employer. *See generally, Louisiana-Pacific Corp. v. Int'l Bh'd of Electrical Workers, Local 2294*, 600 F.2d 219 (9th Cir. 1979) (enforcing conflicting arbitration awards where the employer sought judicial relief *after* both arbitration awards had been rendered). Thus, the employer would be required to pay two employees to perform one job for as long as the job exists.[23] Such a result is manifestly unjust, particularly under the facts of this case. Here, the Postal Service has sought judicial relief at the earliest possible time,[24] and all three parties have already agreed to a single set of substantive standards governing work assignments in the Postal Service.

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[23] In *Louisiana-Pacific Corp. v. Int'l Bh'd of Electrical Workers, Local 2294*, 600 F.2d at 220, the jobs in dispute were of limited duration, and thus there was not such a hardship on the employer as there would be when the dispute is over permanent jobs.

[24] The court below limited its *Louisiana-Pacific* decision to the situation where the employer sought relief *after* both arbitration awards had been rendered. Pet. App. 8a.

In the final analysis, this Court has broad authority under Section 301—and by implication under Section 1208—to formulate a common law of collective bargaining agreements which effectuates federal labor policy. *Textile Workers v. Lincoln Mills*, 353 U.S. at 456-57. Although tripartite arbitration may, in some minimal way, infringe upon the absolute voluntariness of the collective bargaining agreement, it is the only reasonable way to effectuate the federal labor policy favoring the prompt resolution of labor disputes by private arbitration. As the Court of Appeals below found, tripartite arbitration is the only "practical, economic, convenient, and fair" method of resolving these disputes while avoiding a duplication of effort and the possibility of conflicting arbitration awards. Pet. App. 8a; *accord. CBS*, 414 F.2d at 329. Thus, it is not surprising that every court that has addressed this issue has endorsed the concept of tripartite arbitration. See discussion *supra* pp. 3-7.

CONCLUSION

For the reason stated herein, the respondent National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO, hereby prays that the American Postal Worker Union's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990), be denied.

Respectfully submitted,

ROBERT CONNERTON
(Counsel of Record)
ORRIN BAIRD
CONNERTON, RAY & SIMON
1920 L Street, N.W.
Fourth Floor
Washington, D.C. 20006
(202) 466-6790